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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 422

W. W. CUSTER, PETITIONER,

vs.

ROB B. McCUTCHEON, SUBSTITUTED FOR F. M. BRESHEARS, DECEASED, UNITED STATES MARSHAL FOR THE DISTRICT OF IDAHO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,344)

(35,344)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1931

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IN THE

District Court of the United States

For the District of Idaho

Southern Division

W. W. CUSTER,

Plaintiff,

vs.

F. M. BRESHEARS, United States Marshal for the District of Idaho,

Defendant.

No. 1530

COMPLAINT

Comes now the plaintiff above-named and complains of the defendant above-named and for cause of action alleges:

I.

That the defendant, F. M. Breshears, is the regularly appointed, duly qualified and acting United States Marshal within and for the District of Idaho.

II.

That on the 9th day of October, 1929, the de-

fendant above named, acting, or pretending to act, under and pursuant to a purported writ of execution issued out of the District Court of the United States, for the District of Idaho, Southern Division, under and upon a certain judgment made and entered in the said court on the 7th day of March, 1921, in a certain cause wherein the United States of America was plaintiff, and George H. Schodde, W. W. Custer, Louis Nelson, C. H. Matson and Claude Myers were defendants, which judgment was against the defendants in said action jointly and severally in the sum of $2086.87, and which said execution is in the amount of said judgment, together with interest thereon from the said 7th day of March, 1921, amounting to the aggregate sum of $3500, levied upon certain property and moneys of this plaintiff, to-wit: upon the sum of $3500, or the amount mentioned in said purported execution, of moneys of plaintiff on deposit to the credit of plaintiff in the Lincoln County National Bank at Shoshone, Idaho.

III.

That this plaintiff was one of the defendants mentioned in the action aforesaid, and that he has ever since the said 7th day of March, 1921, continuously resided at Shoshone, in the county of Lincoln, state of Idaho.

IV.

That under the laws of the United States and of the state of Idaho, and the rules of this court, the judgment aforesaid is unenforcible by reason of limitations, and that the purported execution issued thereunder on the 21st day of September, 1929, under and pursuant to which the defendant herein has made the levy and committed the acts hereinabove alleged, was, and is in all respects void and invalid.

V.

That notwithstanding the fact that said judgment is unenforcible as aforesaid, and that the said purported execution is in all respects void and invalid, the defendant herein threatens to, and will, unless restrained therefrom by proper order of this court, take into his possession the moneys of plaintiff levied upon as aforesaid and now on deposit in said Lincoln County National Bank at Shoshone, Idaho, and will apply said moneys of this plaintiff to the payment and satisfaction of said unenforcible judgment and void and invalid execution, all of which will be to the great and irreparable injury of plaintiff, and that such irreparable injury will result to the plaintiff herein before the matter of issuing a preliminary restraining order herein can be heard on notice.

VI.

That plaintiff does not have any plain, speedy or adequate remedy at law.

WHEREFORE, Plaintiff prays judgment, that pending the final determination of this action, the defendant be enjoined and restrained from withdrawing the moneys of plaintiff on deposit in the Lincoln County National Bank of Shoshone, Idaho, to the credit of plaintiff from said bank and from applying or using said moneys in the payment or satisfaction of the judgment of this court, made and entered on the 7th day of March, 1921, in that certain action wherein the United States of America was plaintiff, and George H. Schodde, W. W. Custer, Louis Nelson, C. H. Matson and Claude Myers were defendants, and of the purported execution issued thereunder on the 21st day of September, 1929;

That the judgment hereinabove mentioned and referred to be adjudged and decreed to be unenforcible as against this plaintiff, and that the execution issued thereunder as hereinabove alleged be decreed and adjudged to be in all respects void and invalid; for his costs and disbursements in this behalf incurred and expended, and for such other and fur-

ther relief as to the court may seem meet and equitable.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff,
Residing at Twin Falls, Idaho.

(Duly Verified and Service Acknowledged.)

Endorsed, Filed October 10, 1929.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER FOR TEMPORARY RESTRAINING ORDER

The plaintiff in the above entitled cause having commenced an action in the District Court of the United States for the District of Idaho, Southern Division, against the defendant, and having prayed for an injunction against the defendant requiring him to refrain from certain acts in said complaint, and hereinafter more particularly mentioned:

Now, on reading the complaint in said action, duly verified and it satisfactorily appearing to me therefrom, and the United States Attorney appearing for defendant F. M. Breshears,

IT IS ORDERED, That a temporary restraining order issue out of this court by the clerk thereof, to the effect that the defendant F. M. Breshears be and he is hereby restrained from disbursing or transferring any and all funds and monies now in his possession or which may hereafter come into his possession under and by virtue of that certain execution heretofore issued out of this court on the 21st day of September, 1929, on a judgment in the case styled United States of America vs. George H. Schodde, et al, No. 853 Southern, and is hereby ordered to retain custody of any and all of such funds until further orders of this court.

This order is made and conditioned upon the above named plaintiff filing with the clerk of this court a good and sufficient bond for this restraining order, in the sum of five hundred dollars.

Dated this 10th day of October, A. D. 1929.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed October 10, 1929.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

TEMPORARY RESTRAINING ORDER

The President of the United States to F. M. Breshears, United States Marshal for the District of Idaho, the above-named defendant:

The plaintiff having filed his complaint in the District Court of the United States, for the District of Idaho, Southern Division, against the defendant praying for an injunction against the defendant requiring him to refrain from certain acts in said complaint, and hereinafter more particularly mentioned. On reading the said complaint in this action, duly verified, and it satisfactorily appearing to the said court therefrom that it is a proper case for an injunction, that sufficient grounds exist therefor, and an undertaking having been given, and the United States Attorney appearing for the defendant F. M. Breshears;

We therefore, in consideration thereof, and of the particular matters of the said complaint set forth, do strictly COMMAND you, that until the further order of said court, you, and your servants, agents, attorneys, employees, and all persons acting under the control, authority or direction of you, do absolutely refrain from and desist from disbursing or transferring any and all funds and monies now in your possession or which may hereafter come into your

possession under and by virtue of that certain execution heretofore issued out of this court on the 21st day of September, 1929, on a judgment in the case styled United States of America vs. George H. Schodde, et al, No. 853, Southern, and you are hereby enjoined to retain custody of any and all of such funds until further orders of this court.

WITNESS, The Honorable Charles C. Cavanah, Judge of the District Court of the United States for the District of Idaho, Southern Division, and the seal of said District Court this 10th day of October, 1929.

W. D. McREYNOLDS, Clerk.

(Seal)

(Service Acknowledged.)

Endorsed, Filed October 10, 1929.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

UNDERTAKING FOR TEMPORARY INJUNCTION

WHEREAS, The above named plaintiff has commenced an action in the District Court of the United States for the District of Idaho, Southern Division, against the above-named defendant, and is about

to apply for a temporary injunction in said action against the defendant enjoining and restraining the defendant from the commission of certain acts as in the complaint filed in the said action are more particularly set forth and described:

NOW, THEREFORE, We, the undersigned, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and having complied with the constitution and laws of the state of Idaho relating to foreign corporations, and being legally qualified and entitled to execute bonds and undertakings as a surety within the state of Idaho, in consideration of the premises and of the issuing of said temporary injunction, do jointly and severally and undertake in the sum of five hundred ($500) dollars, and promise to the effect that in case said injunction shall issue the plaintiff will pay to the said party enjoined such damages not exceeding the sum of five hundred ($500) dollars as such party may sustain by reason of said temporary injunction if the said District Court of the United States, for the District of Idaho, Southern Division, shall finally decide that the plaintiff was not entitled thereto.

Dated this 10th day of October, 1929.

HARTFORD ACCIDENT & INDEMNITY CO.

(Seal)

By PAUL CRAVER,
Its Attorney-in-Fact.

Approved October 10th, 1929.

CHARLES C. CAVANAH, Judge.

Endorsed, Filed October 10, 1929.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MOTION

Comes now the above-named defendant, F. M. Breshears, and moves the court for its order dismissing plaintiff's complaint upon the ground and for the reason that said complaint does not state facts sufficient in equity to entitle plaintiff to name relief.

WHEREAS, Defendant prays that said complaint be dismissed, and for costs.

H. E. RAY,
United States Attorney for the District of Idaho.

Endorsed, Filed October 10, 1929.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 1530

MEMORANDUM OPINION

November 5, 1929

Bothwell & Chapman,

Attorneys for Plaintiff.

H. E. Ray, United States District Attorney; Wm. H. Langroise and Sam S. Griffiin, Assistants,

Attorneys for Defendant.

CAVANAH, *District Judge.*

The plaintiff, a judgment debtor of the United States, brings this action to enjoin the United States Marshal of the District of Idaho from withdrawing certain monies of plaintiff on deposit in the Lincoln County National Bank, Shoshone County, Idaho, and applying the same in satisfaction of a judgment of this court entered March 7, 1921, in favor of the United States, under an execution issued on September 21, 1929, upon the contention that the judgment is unenforcible by reason of the statute of limitations of the state. The section of the state statute, relied upon by plainiff, reads: "The party in whose favor a judgment is given may at any time within five years after the entry thereof have a writ of execution issued for its enforcement."—C. S. Sec. 6910. A lien for five years is

given by Section 6902 of the Idaho Comp. Statutes upon all real property of the judgment debtor. The levy made by the Marshal under the writ of execution is upon personal property, and not on real property, and is not an attempt to enforce any claim of a judgment lien on real property.

The two points involved in the pleadings, and urged by the United States, have been presented with much earnestness:

First, that the plaintiff cannot bring this, a separate suit, to prevent the enforcement of the judgment obtained by the United States on March 7, 1921, in the case of United States vs. George H. Schodde, et al. The contention does not seem to have any support by the authorities, for where a final judgment has been entered in a case, and thereafter an attempt is made to enforce such judgment by levy, and the contention is made that the judgment is not enforcible by reason of limitations, another and separate action may be brought to restrain the enforcement of such judgment against the officers in whose hands a writ of execution is placed.

Second, can the state statute of limitations as to the life of a judgment, or the time within which a judgment lien on real property can be enforced, be invoked as against the United States, where the United States does not attempt to levy and enforce a judgment lien upon real property,

It will be conceded that judgments in favor of the United States have the same effect in their operation as to a lien upon the property of judgment debtors as the law of the state prescribes for judgments of the state courts. United States v. Minor, 235 F. 101. And decrees of the United States Courts, subject to the acts of Congress, shall be enforced in actions at law in the same manner as such judgments in the state courts. Rule 73 of this court. The scope of the limitation provisions of the state statute relied upon, which is founded in Sections 6902 and 6910 of the state statutes, show that they relate to the time of issuance of an execution and a lien given upon real property of the judgment debtor, and do not relate to the life of a judgment, for the United States, as a sovereign power, is not bound by any statute of limitations of the state, unless Congress manifests its intention otherwise. An effort is here made to prevent the United States from enforcing a judgment secured in its own court for the benefit of the Government, and therefore the negligence or laches of the officers of the Government in failing to enforce the judgment, within the statute of limitations as to the life of a judgment, do not avail against the United States in its governmental capacity. This principle is now established beyond any doubt. The United States is not bound by any statute of limitations of a state, except where statutory provision to the contrary exists. Congress has not said that the state statute

of limitations applies to and bars the United States from enforcing its judgments after a certain period. This principle is amply sustained by the authorities, and the conclusion here announced is in entire accord with the well considered opinions of a large number of federal courts. United States v. Nashville, etc. Ry. Co., 118 U. S. 120; Stanley v. Schroalby, 147 U. S. 508; United States v. Insley, 130 U. S. 263; United States v. Thompson, 98 U. S. 486; United States v. Beebe, 127 U. S. 338; United States v. Devereaux, 90 F. 182; United States v. Harpootlian, et al., 24 F. (2) 646; United States v. Porto Rico Fruit Union, 12 F. (2) 961.

The motion to dismiss the complaint will be sustained, and the temporary restraining order heretofore issued is set aside and annulled and the defendant may have judgment for costs.
Endorsed, Filed November 6, 1929.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER

Upon consideration, and in harmony with Memorandum Opinion this day filed:

IT IS ORDERED, That the motion to dismiss the complaint be and the same is hereby sustained, and

the complaint is dismissed, and that the temporary restraining order heretofore issued be and the same is hereby set aside and annulled, and that the defendant have judgment for costs.

Dated: Moscow, Idaho, November 5th, 1929.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed November 6, 1929.
W. D. McREYNOLDS, Clerk.

CERTIFICATE OF JUDGE THAT ORDER DISMISSING PLAINTIFF'S COMPLAINT, SETTING ASIDE AND ANNNULLING THE TEMPORARY RESTRAINING ORDER THERETOFORE ISSUED AND AWARDING JUDGMENT TO DEFENDANT FOR COSTS AGAINST PLAINTIFF WAS CONSIDERED AND DECIDED AS A MATTER OF LAW

In this cause I hereby certify that the order dismissing the complaint of the plaintiff, setting aside and annulling the temporary restraining order theretofore issued and awarding judgment to defendant for costs against plaintiff made herein on November 6th, 1929, was submitted, considered and decided wholly as a matter of law upon undisputed facts appearing from the record, which are substantially set forth in the memorandum opinion of November 5, 1929, and are contained in the com-

plaint of the plaintiff and order for temporary restraining order and motion of defendant to dismiss.

This certificate is made a part of the record and will be certified and set up as a part of the proceedings herein.

Dated this 3rd day of February, 1930.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

PETITION FOR APPEAL

The above-named plaintiff, W. W. Custer, conceiving himself aggrieved by the order denying, granting and sustaining the motion of defendant to dismiss the plaintiff's complaint herein and setting aside and annulling the temporary restraining order heretofore issued and awarding defendant judgment for costs against plaintiff made and entered in the above-entitled cause on the 6th day of November, 1929, does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and

your petitioner prays that this appeal may be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner, W. W. Custer, desiring to supersede the execution of said order made and entered on November 6, 1929, dismissing the plaintiff's complaint and setting aside and annulling the temporary restraining order heretofore issued in this cause and awarding defendant judgment for costs against plaintiff, and the plaintiff desiring the reinstatement and continuation of said restraining order pending the determination of said appeal, tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal a supersedeas may be issued, or an order reinstating and continuing said restraining order pending the determination of said appeal.

Dated this 3rd day of February, A. D. 1930.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Petitioner,
Residing at Twin Falls, Idaho.

(Service Acknowledged.)

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
M. Franklin, Deputy.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL

And now, to-wit: on the 3rd day of February, 1930, it is ORDERED that the petition for appeal of the plaintiff herein be granted, and that the appeal be allowed as prayed for the same to operate as a supersedeas and that the restraining order heretofore issued herein be reinstated and continued in full force and effect pending the determination of said appeal upon the petitioner and plaintiff, W. W. Custer, filing a bond in the sum of $4000.00, with sufficient sureties conditioned as required by law.

Dated this 3rd day of February, 1930.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

And now comes the plaintiff, W. W. Custer, and having prayed an appeal to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, from the order entered in the above-entitled cause on the 6th day of November, 1929, dismissing plaintiff's complaint herein and setting aside and annulling the temporary restraining order theretofore issued and awarding defendant judgment for costs against plaintiff, says that said order made and entered aforesaid is erroneous and unjust to this plaintiff and particularly in this:

I.

Because the court erred in holding that the defendant is entitled to levy upon the property of this plaintiff under the execution issued upon a judgment in the case of "United States of America v. George H. Schodde, et al.," wherein the plaintiff herein was a defendant, and to apply the property of this plaintiff to the satisfaction of such judgment mentioned in plaintiff's complaint after the expiration of the time provided by the statutes of the state of Idaho for the issuance of executions upon judgments within said state and in holding that the said judgment can be enforced in any manner other than the manner provided for the enforcement of judgments at law rendered in the state courts of the state of Idaho.

II.

Because the court erred in holding, ordering and deciding that the complaint of the plaintiff should

be dismissed; that the temporary restraining order heretofore issued be set aside and annulled and in ordering judgment to defendant against plaintiff for costs.

III.

Because the court erred in dismissing the complaint of plaintiff and in not granting him the relief he therein prayed for.

WHEREFORE, The said plaintiff prays that the order entered herein be reversed and set aside with directions to said District Court to enter an order in compliance with the prayer of plaintiff's complaint.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff,
Residing at Twin Falls, Idaho.

(Service Acknowledged.)

Endorsed, Filed February 3, 930.
W. D. McREYNOLDS, Clerk.
By M. FFranklin, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, That W. W. Custer, as principal, and the United

States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto the defendant in the above-entitled cause in the just and full sum of two hundred ($200) dollars, for the payment of which well and truly to be made we bind ourselves and each of us, and our, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 3rd day of February, 1930.

The condition of this obligation is such that:

WHEREAS, the above-named W. W. Custer, plaintiff, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order made and entered in this cause on the 6th day of November, 1929, in the District Court of the United States for the District of Idaho, Southern Division.

NOW, THEREFORE, if the above-named plaintiff and appellant shall prosecute his said appeal to effect and answer all costs if he shall fail to sustain his said appeal, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principal, W. W. Custer, has hereunto caused his name to be subscribed by his attorneys of record, and the said surety, United States Fidelity and Guaranty Com-

pany, a corporation, has caused its name to be hereunto subscribed by its duly authorized officers and its corporate seal affixed the day and year first above written.

W. W. CUSTER, Principal.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By Henry Whitson, Its Attorney-in-Fact,

(Seal) Surety.

Attest:

Approved this 3rd day of February, 1930.
CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL (SUPERSEDEAS)

KNOW ALL MEN BY THESE PRESENTS:

That we, W. W. Custer, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the defendant above named in the penal sum of four thousand and no-100 ($4000.00) dollars, to be paid to the said de-

fendant, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of February, 1930.

The condition of this obligation is that that:

WHEREAS, the above-named W. W. Custer, the said principal, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a certain order made and entered in said cause on the 6th day of November, 1929, in the United States District Court for the District of Idaho, Southern Division.

NOW, THEREFORE, If the above-named principal, W. W. Custer, shall prosecute his said appeal to effect and answer all damages and costs if he fails to make his appeal good, then the above obligation to be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, The said principal has caused his name to be hereunto subscribed by his duly authorized attorneys, and the said surety has caused its name to be hereunto subscribed by its duly authorized officer, and its corporate seal affixed the day and year first above written.

W. W. CUSTER, Principal.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By Henry Whitson, Its Attorney-in-Fact,

(Seal) Surety.

Approved February 3rd, 1930.
CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

CITATION

UNITED STATES OF AMERICA,—ss.

To: F. M. Breshears, United States Marshal for the District of Idaho, defendant, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth District, to be held at the City of San Francisco, in the state of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein W. W. Custer

is appellant and you are respondent, to show cause, if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable Charles C. Cavanah, United States District Judge, for the District of Idaho, this 3rd day of February, 1930, and of the Independence of the United States the one hundred and fifty-fourth year.

CHARLES C. CAVANAH,
District Judge.

Attest:
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy. (Seal)

Service of the foregoing Citation and receipt of copy thereof admitted by the undersigned on the date set opposite our signature.

F. M. BRESHEARS, February 3rd, 1930, defendant, by H. E. Ray, W. H. Lanroise, Sam S. Griffiin, his Attorneys.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT ON APPEAL

To: Honorable W. D. McReynolds, Clerk of the above-entitled court:

You will please prepare the record on appeal of the plaintiff, W. W. Custer, taken in the above-entitled cause, from the order made and entered therein on the 6th day of November, 1929, dismissing the complaint of the plaintiff, setting aside and annulling the temporary restraining order theretofore issued and awarding the defendant judgment against plaintiff for costs; such record to consist of the following:

Complaint.

Order for Temporary Restraining Order.

Temporary Restraining Order.

Undertaking for Temporary Restaining Order.

Motion of Defendant to Dismiss Plaintiff's Complaint.

Memorandum Opinion of Judge Cavanah, dated November 5th, 1929.

Order dated and filed November 6, 1929.

Certificate that order was decided as question of law.

All papers filed in connection with this appeal, namely:

Petition for Appeal,

Assignment of Errors,

Order Allowing Appeal,

Bond on Appeal (for costs),

Bond on Appeal (Supersedeas),

Citation.

In preparing the above record you will please omit the title of all pleadings except the first named above, but in lieu thereof insert the words, "Title of Court and Cause," to be followed by the name of the pleading or instrument.

You will also please omit the verification of all pleadings, but in lieu thereof insert wherever the pleading is verified the words, 'Duly Verified."

Dated this 3rd day of February, A. D. 1930.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff and Appellant,
Residing at Twin Falls, Idaho.

Copy received this 3rd day of February, 1930.

H. E. RAY,
W. H. LANGROISE,
SAM S. GRIFFIN,
Attorneys for Defendant.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

CLERK'S CERTIFICATE

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 34, inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $53.10, and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 18th day of February, 1930.

W. D. McREYNOLDS, Clerk.

(SEAL)

No. 6079

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. W. CUSTER,

Appellant,

vs.

F. M. BRESHEARS, United States Marshal for the District of Idaho,

Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

Ordered above cause argued by Mr. James R. Bothwell, counsel for the appellant, and by Mr. H. E. Ray, U. S. Attorney, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel to enter into and file a stipulation *re* substitution of appellee, and the cause to stand submitted upon the argument this day made.

———

[Title of Court and Cause.]

MOTION FOR SUBSTITUTION OF PARTY DEFENDANT AND APPELLEE.

Comes now the plaintiff and appellant, W. W. Foster, in the above-entitled action and moves that

an order be made herein substituting Rob B. McCutcheon, United States Marshal for the District of Idaho, as defendant and appellee, in this action, as of the date of May 26, 1930.

This motion is based upon the records, papers and files in this action, including the stipulation of counsel.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff and Appellant, Residing at Twin Falls, Idaho.

[Title of Court and Cause.]

STIPULATION.

Reserving the question as to whether the above action is one that survives,—

IT IS STIPULATED between counsel for the above-named parties that the above-named appellee, F. M. Breshears, died May 21st, 1930, and that the Honorable C. C. Cavanah, Judge of the United States Court for the District of Idaho, in open court, on May 26th, 1930, duly and regularly appointed Rob B. McCutcheon, United States Marshal for the District of Idaho, who thereupon immediately qualified, to fill the vacancy occasioned by the death of F. M. Breshears, appellee, in accordance with Title 28, Section 511, U. S. C.

IT IS FURTHER AGREED that the Court consider the argument of the case as though substitution had been made prior to May 27th, 1930.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Appellant, Residence: Twin Falls, Ida.

H. E. RAY,
U. S. Attorney for the District of Idaho,
Attorney for Appellee. Residence: Boise, Idaho.

[Endorsed]: Filed Jun. 7, 1930. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the nineteenth day of July, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court

in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

DIETRICH, Circuit Judge.—The posture of the case in point of fact need not be explained, for by the parties it is agreed the record exhibits only a general question of law, namely, whether upon a judgment for money, recovered by the United States against a citizen, in the United States District Court for the District of Idaho, an execution may issue more than five years after the entry thereof. By the court below the question was answered in the affirmative.

Section 916 of the United States Revised Statutes (28 U. S. C. A. 727) provides that:

> "The party recovering a judgment in any common-law cause in any district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of

the judgment debtor, as are provided in like causes by the laws of the State in which such court is held, or by any such laws which may subsequently be enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such State laws as may be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Standing Rule 73 of the United States District Court for Idaho is as follows:

"Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced, and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments and of decrees and proceedings supplementary to execution as said provisions now exist or as they shall exist at the time in question are adopted as rules of this court; and the marshal of this court shall conform his proceedings thereto; * * * "

And by Section 6910 of the Idaho Compiled Statutes 1919 it is provided:

"The party in whose favor judgment is given, may at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

Under these provisions it is conceded by the Government that in the case of a judgment in favor of a private person execution thereon cannot lawfully issue after the lapse of five years from the entry thereof. And on behalf of the appellant it is not controverted that, in the absence of consent expressed or clearly implied by a federal statute, the United States is not bound by any statute of limitations. The reasoning of appellant, however, is that by virtue of section 916, *supra*, and Rule 73 of the District Court, the state statute above quoted is in effect adopted as a part of the law of the United States, that the state statute in effect creates a new right, and that the Government must take the right subject to the limitations prescribed, one of which is that execution must issue within five years or the entire right terminates.

But the right of a judgment creditor to execution process does not have its origin in the state statute; it existed at common law. 3 Cooley's Blackstone, 431; Freeman on Executions, 3d ed., Sec. 27. The statute only enlarged the time during which the right may be exercised from one year to five years, and seemingly under the common law the limitation of time was not recognized as binding upon the state. Coombs vs. Jordan, 3 Bland's Chancery (Md.), 284, 324; s. c. 22 Am Dec. 236, 271. See, also, Nimmo's Executor vs. Commonwealth, 4 Hen. & M. (Virginia Rep. Ann..) 57. While we have failed to find in any of the texts a discussion of this exception, it would appear to be highly illogical to hold

that the state may, without regard to time, bring an action to recover on a claim but by lapse of time it is barred from enforcing its judgment thereon. After all, the ultimate purpose of an action is not to get a judgment but to recover the claim, and every consideration underlying the rule that the state should not be barred from bringing the suit with equal force supports the view that it should not be barred from prosecuting the suit, once it is begun, to the complete accomplishment of the purpose thereof. If it is not to be prejudiced by the negligence of its officers and agents in bringing the action, neither should it be defeated by like negligence in respect of taking out execution process upon the judgment. In the absence of some expression to the contrary it is therefore to be presumed the legislature intended only to enlarge the time of an established rule and not to widen its scope. While in its phraseology the statute suggests nothing more, under appellant's interpretation it would operate not to enlarge but to abridge a pre-existing right of one class of judgment creditors.

With the exception of United States vs. Noojin, 155 Fed. 377, 380, which seemingly supports the conclusion we have reached, no decided case has come to our notice where the precise question has been considered. Of the other decisions cited in the briefs those most nearly in point are Fink vs. O'Neil, 106 U. S. 272; United States vs. Minor, 235 Fed. 101; United States vs. Kendall, 263 Fed. 126, and United States vs. Harpootlian, 24 Fed. (2d) 646. In the Fink case was involved only the ques-

tion whether as a creditor the Government could ignore state exemption laws, and in the public policy underlying such statutes the court found cogent reasons for holding that Congress did not intend to except the United States from the operation thereof. In each of the other three cases the question at issue was whether or not a statute limiting the duration of a judgment lien was binding upon the Government. In the Harpootlian case the question was answered in the affirmative, a conclusion apparently out of harmony with the view adopted in the other two. But however that may be, admittedly there was no such lien at common law and hence the liens in question were purely creatures of the statute. Not without reason, therefore, it could be held that the United States, as well as other creditors, must take such a lien with its statutory restrictions and limitations.

Affirmed.

[Endorsed]: Opinion. Filed June 9, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6079.

W. W. CUSTER,

Appellant,

vs.

ROB B. McCUTCHEON, Substituted for F. M. BRESHEARS, United States Marshal for the District of Idaho, Deceased,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Idaho, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Idaho, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered Jun. 9, 1930. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-five (45) pages, numbered from and including 1 to and including 45, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of August, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(378)

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In the

Supreme Court of the United States

OCTOBER TERM, 1930

NO. 422

W. W. CUSTER, Petitioner,

vs.

ROB. B. McCUTCHEON, Substituted for F. M. Breshears, Deceased, United States Marshal for the District of Idaho,

Respondent.

PETITION FOR WRIT OF CERTIORARI

In the

Supreme Court of the United States

OCTOBER TERM, 1930

NO.....

W. W. CUSTER, Petitioner,

vs.

ROB. B. McCUTCHEON, Substituted for F. M. Breshears, Deceased, United States Marshal for the District of Idaho,

Respondent.

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of W. W. Custer respectfully shows to this Honorable Court:

—A—

SUMMARY STATEMENT OF THE MATTER INVOLVED

On March 7, 1921, judgment was entered in the District Court of the United States for the District of Idaho, Southern Division, in favor of the United States and against W. W. Custer, petitioner herein, and others, for the sum of $2086.87. On September 21st, 1929, eight years six months and fourteen days after judgment, execution was issued and delivered to F. M. Breshears, United States Marshal for the District of Idaho, directing that the judgment, with interest, which then amounted to approximately $3500., be satisfied by levy upon the property of petitioner and others, defendants in the action. The Marshal levied upon petitioner's bank account on October 9, 1929, by on that day serving a garnishment on the Lincoln County National Bank of Shoshone, Idaho, notifying said bank that all moneys, goods and credits of petitioner Custer were attached pursuant to the mandate of the aforesaid execution and the Marshal thereafter took the sum of $3500., into his possession from the petitioner's bank account.

Petitioner, W. W. Custer, instituted this suit in the United States District Court for the District of Idaho, Southern Division on October 10, 1929, to enjoin the Marshal, F. M. Breshears, from withdrawing the moneys of petitioner from the bank and from applying or using said moneys in payment or satisfaction of the judgment and for a decree adjudging said execution to be in all respects void and unenforcible, for the reason that under the laws of the United States and of the State of Idaho, and the rules of the United States District Court for the District of Idaho, the time had expired within which an execution could be legally issued, or a judgment enforced by means of execution (R.pp.7-11). A temporary restraining order was issued restraining the Marshal, F. M. Breshears, from disbursing or transferring the moneys taken into his possession under and by virtue of the execution in satisfaction of the judgment in favor of the United States, and the Marshal was also ordered to retain custody of said moneys until the further order of the court (R. pp. 11-15). Respondent Breshears moved to dismiss the complaint of petitioner upon the ground that said complaint does not state facts sufficient in equity to entitle plaintiff to name relief (R. p. 16). Respondent's motion was sustained. Memorandum opinion filed November 5, 1929, and order of dismissal entered November 6, 1929 (R. pp. 17-21). The

cause was disposed of as a matter of law by the District Court (R. pp. 21-22).

Two questions were considered by the District Court: First, Can petitioner maintain a separate action to enjoin the enforcement of a judgment? The court held that the action could be maintained (R. p. 18). Second, Conceding that judgments of the United States District Court in common law actions shall be enforced in the same manner as such judgments are enforced in state courts, under provisions of Section 916, United States Revised Statutes (28 U. S. C. A., Sec. 727) (Comp. Stat. Sec. 1510), and rule 73 of the United States District Court for the District of Idaho, is Section 6910, Idaho Compiled Statutes 1919, which provides that "the party in whose favor judgment is given may at any time within five years after the entry thereof have a writ of execution issued for its enforcement," a statute of limitations, and if so, may it be invoked against the United States? The court decided that the Idaho Statute was one of limitations and that it could not be invoked against the United States, notwithstanding Rule 73 of the Court, or Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) (R. pp. 18-20).

On appeal the United States Circuit Court of Appeals for the Ninth Circuit affirmed the judg-

ment of the District Court. Opinion filed and decree entered June 9, 1930 (R. pp. 39-45).

Rob B. McCutcheon, United States Marshal for the District of Idaho, was substituted for F. M. Breshears, deceased, pursuant to motion and stipulation of counsel (R. pp. 37-39).

The United States Circuit Court of Appeals held in its opinion that although it be conceded that under Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) and Rule 73 of the United States District Court for the District of Idaho, and Section 6910 Idaho Compiled Statutes 1919, in the case of a judgment in favor of a private person execution cannot lawfully issue after the lapse of five years from the entry of judgment, the same rule does not apply to the United States. This decision is reached by the Court holding that in the enactment of Section 916 United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510), Congress did not give its express or implied consent that the United States should be bound by a statute of limitations, also that Section 6910, Idaho Compiled statutes 1919, is a statute of limitations restricting a common law right which was in existence at the time of its enactment and further that by accepting the provisions of the state law of Idaho as to similar remedies upon a judgment in any common law case by execution or other-

wise under the provisions of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510), litigants in the United States District Courts were accorded no new rights in addition to those in existence at common law and, consequently, do not accept those rights subject to the limitations of time as stated in the state statutes (R. pp 42-44).

—B—

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) In deciding that an execution may lawfully issue in favor of the United States after the lapse of five years from the entry of a judgment in a United States District Court in Idaho, and that petitioner's moneys in a bank in Idaho may be taken by the United States Marshal under and by virtue of an execution issued over eight years after the entry of judgment, the United States Circuit Court of Appeals of the Ninth Circuit rendered a decision in conflict with the decision of the United States Circuit Court of Appeals of the Second Circuit, as announced in the case of United States v. Harpootlin, et al., 24 Fed. (2nd) 646.

(2) In holding that Section 6910, Idaho Compiled Statutes 1919, is a statute of limitations

restricting a common law right and that the United States as a litigant in the United States District Court for Idaho may proceed under the state law by execution pursuant to Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) and Rule 73 of the United States District Court for the District of Idaho, and still not be bound by the provisions of the state law as to the time within which excution may lawfully issue, the United States Circuit Court of Appeals for the Ninth Circuit, has decided an important question of general law is an untenable way and in conflict with the weight of authority.

(3) In deciding that Congress did not give its consent, either express or implied, that the United States should be bound by the state statutes of limitations in enforcing a judgment in any common law action in any District Court by execution pursuant to the provision of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510) and Rule 73 of the United States District Court for the District of Idaho, the United States Circuit Court of Appeals for the Ninth Circuit, has decided an important question of general law in an untenable way and in conflict with the weight of authority.

(4) In holding that in the enactment of Section 916, United States Revised Statutes (28 U. S.

C. A. Sec. 727) (C. S. Sec. 1510), Congress did not consent impliedly or expressly that the United States should be bound by state statutes of limitations in enforcing a judgment in any common law action in any District Court by execution, the United States Circuit Court of Appeals for the Ninth Circuit has decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court.

(5) In holding as follows: that in the enactment of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510), Congress did not give its consent, express or implied, that the United States should be bound by a state statute of limitations; that Section 6910, Idaho Compiled Statutes 1919, is a statute of limitations; that by accepting the provisions of the state law of Idaho as to similar remedies upon a judgment in any common law cause by execution or otherwise under the provisions of Section 916, United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1510, litigants in the United States District Courts were accorded no new rights in addition to those in existence at common law and, consequently, do not accept those rights subject to the limitations of time as stated in the state statutes; and that an execution may lawfully issue in favor of the United States after the lapse of five years from the entry of a judgment

in a United States District Court in Idaho, and that petitioner's moneys in a bank in Idaho may be taken by the United States Marshal under and by virtue of an execution issued over eight years after entry of judgment, the United States Circuit Court of Appeals for the Ninth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of, and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6079, W. W. Custer, Appellant, vs. Rob B. McCutcheon, substituted for F. M. Breshears, deceased, United States Marshal for the District of Idaho, appellee, and that said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as

to this Honorable Court may seem meet and just; and your petitioner will ever pray.

W. W. CUSTER

JAMES R. BOTHWELL,
Counsel for Petitioner.

W. ORR CHAPMAN,
Of Counsel.

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SEP 4 1930

CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1930

NO. 422

W. W. CUSTER, Petitioner,

vs.

ROB. B. McCUTCHEON, Substituted for F. M. Breshears, Deceased, United States Marshal for the District of Idaho,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JAMES R. BOTHWELL,
Counsel for Petitioner.

W. ORR CHAPMAN,
Of Counsel.
of Twin Falls, Idaho.

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In the

Supreme Court of the United States

OCTOBER TERM, 1930

NO.....

W. W. CUSTER, Petitioner,

vs.

ROB. B. McCUTCHEON, Substituted for F. M. Breshears, Deceased, United States Marshal for the District of Idaho,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

THE OPINIONS OF THE COURTS BELOW

The case in the United States District Court is entitled, "W. W. Custer, Plaintiff, vs. F. M. Breshears, United States Marshal for the District of Idaho, Defendant." The opinion and judgment of the District Court were filed November 6, 1929, and appear in the record at pages 17 to 21. The case in the United States Circuit Court of Appeals is entitled, "W. W. Custer, Appellant, v. Rob B. McCutcheon, substituted for F. M. Breshears, Deceased, United States Marshal for the District of Idaho, Appellee," and the opinion and decree of the United States Circuit Court of Appeals will be found on pages 40 to 45, inclusive, of the record.

II

JURISDICTION

The Supreme Court has jurisdiction to require by Certiorari that this cause be certified for determination by it with the same power and authority, and with like effect as if the cause had been brought before the court by unrestricted appeal.

United States Judicial Code, Sec. 240, as amended by the act of February 13, 1925. 43 Statutes 938.

Decree of the United States Circuit Court of Appeals was filed and entered on June 9, 1930 (R. p. 45).

By its decree the United States Circuit Court of Appeals for the Ninth Circuit has decided that the United States may satisfy a judgment by execution issued more than eight years after entry of the judgment (R. p. 44).

This decision is in conflict with the holding in the case of the United States v. Harpootlian, et al., 24 Fed (2d), 646, decided by the United States Circuit Court of Appeals of the Second Circuit, and should entitle the petitioner to a Writ of Certiorari.

Keller et al v. Adams-Campbell Co., Inc., et al., 264 U. S., 314, 68 L. Ed. 705, 44 Sup. Ct., 356.

Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922, 43 Sup. Ct. 531.

The court holds tat the provisions of Section 6910, Idaho Compiled Statutes 1919, operate as a restriction upon common law right and not as a grant of a new right. (R. pp. 42-43). The holding disposes of an important question of general law in an untenable way and in conflict with the weight of authority.

Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 Sup. Ct. 325.

In re Van Tassell's Will, 196 N. Y. S., 491

Culp v. Butler (Ind.), 122 N. E. 684.

Partee v. St. Louis & S. F. R. Co., 204 Fed., 970.

United States ex rel Texas P. Cement Co., v. McCord, 233 U. S., 157, 58 L. Ed. 893.
United States v. Harpootlian et al., 24 Fed. (2d) 646.
23 C. J., Sec. 138, p. 375.

The court also holds that Congress did not consent that the United States shall be bound by a state statute of limitations in enforcing a judgment in a common law action by execution. (R. pp. 43-44). By so holding the court decided an important question of general law in an untenable way and in conflict with the weight of authority and also decided an important question of Federal law which has not been, but should be, settled by the United States Supreme Court.

Fink v. O'Neil, 106 U. S., 272, 27 L. Ed. 196, 1 Sup. Ct., 325.
Green v. United States, 9 Wall. 655, 76 U. S. S. 658, 19 L. Ed. 806.
Allen v. Clark, 126 Fed., 738, 740, 62 C. C. A., 58, affirming 114 Fed. 374.
Payette v. Marshall Co., 108 Ia., 660, 163 N. W., 592.
Thompson v. Avery, 11 Ut. 214, 39 Pac. 829.
United States v. Harpootlian, et al., 24 Fed. (2d) 646.

In its decision the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

III

STATEMENT OF THE CASE

A full statement of the case has been given under the heading "A" in the petition and in the interest of brevity the statement will not be repeated at this point.

IV

SPECIFICATION OF ERRORS

I

The United States Circuit Court of Appeals erred in finding and holding that respondent, United States Marshal for the District of Idaho, was entitled to levy upon petitioner's bank account under and by virtue of an execution issued more than eight years after the entry of judgment; and further, that petitioner's bank account could be applied in satisfaction of said judgment under and by virtue of said execution after the lapse of five years, which is the time provided by the statutes of the state of Idaho within which an execution may be issued upon judgments within said state.

II

The United States Circuit Court of Appeals erred in finding and holding that Section 6910, Idaho Compiled Statutes 1919, is a statute of limitation restricting a common law right and that the United States as a litigant in the United States District Court for Idaho, may proceed under the state law by execution pursuant to Section 916

U. S. Rev. Stat. (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), and Rule 73 of the United States District court for the District of Idaho, and still not be bound by the provisions of the state law as to the time within which execution may lawfully issue.

III

The United States Circuit Court of Appeals erred in finding and holding that Congress did not give its consent that the United States should be bound by the state statutes of limitations in enforcing a judgment in any common law action in any District Court by execution pursuant to the provisions of Sec. 916, U. S. Rev. Stat. (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), and Rule 73 of the United States District Court for the District of Idaho.

IV

The United States Circuit Court of Appeals erred in finding and holding that the judgment of the United States District Court should be affirmed in dismissing plaintiff's complaint and granting judgment for costs against plaintiff and in favor of defendant for the reasons set forth in Specification of Errors, I, II and III.

V

ARGUMENT

SUMMARY OF ARGUMENT

(POINT "A")

The decision of the United States Circuit Court of Appeals is contrary to and in conflict with the decision of the United States Circuit Court of Appeals of the Second Circuit, rendered in the case of United States v. Harpootlian, et al., 24 Fed., (2d) 646, on October 13, 1928.

After quoting Section 916 of the United States Revised Statutes (28 U. S. C. A. Sec. 727) Rule 73 of the United States District Court of Idaho, and Section 6910, Idaho Compiled Statutes, 1919, as authority for the procedure followed in the present case, the Circuit Court decides that the United States may proceed to satisfy the judgment obtained in its favor by execution after the lapse of five years, notwithstanding the provisions of the statute of Idaho.

The court likewise in the case of United States v. Harpootlian, et al., supra, quotes Section 916 United States Revised Statutes (U. S. C. A. Sec. 727), a similar rule of the District Court of the United States for the Southern Division of New York and similar Practice Acts of the state of New York, and then announces its decision that the statutes of New York are binding against the United States as a sovereign power, notwithstanding the well recognized rule that the United States as a sovereign power is not bound by any statute

of limitations unless Congress manifests its intention otherwise. The decisions are directly in conflict.

(POINT "B")

In holding that the provisions of Section 6910, Idaho Compiled Statutes 1919, operate as a restriction upon a common law right and not as a grant of a new right, the court disposes of an important question of general law in an untenable way and in conflict with the weight of authority.

Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 Sup. Ct. 325.
In re Van Tassell's Will, 196 N. Y. S. 491.
Culp v. Butler (Ind.), 122 N. E. 684.
Partee v. St. Louis & S. F. R. Co., 204 Fed. 970.
United States ex rel Texas P. Cement Co., v. McCord, 233 U. S. 157, 58 L. Ed. 893.
United States v. Harpootlian et al., 24 Fed. (2d) 646.
23 C. J. Sec. 138, p. 375.

Courts of the United States have no inherent powers to proceed by execution under the common law. Hence the adoption of Section 6910, Idaho Compiled Statutes 1919, by the United States by appropriate legislative enactment did not limit or restrict a common law right of the United States.
Fink v. O'Neil (Supra).

(POINT "C")

The United States Circuit Court of Appeals has decided an important question of general law in an untenable way and in conflict with the weight

of authority and has also decided an important question of federal law which has not been, but should be, settled by the United States Supreme Court, when it held that Congress did not consent that the United States shall be bound by a state statute of limitations in enforcing a judgment in a common law action by execution.

Fink v. O'Neil, 106 U. S. 272, 27 L. Ed. 196, 1 Sup. Ct. 325.

Green v. United States, 9 Wall. 655. 19 L. Ed. 806.

Allen v. Clark, 126 Fed. 738, 740 62 C. C. A. 58, affirming 114 Fed. 374.

Payette v. Marshall County, 108 Ia. 660 163 N. W. 592.

Thompson v. Avery, 11 Ut. 214, 39 Pac. 829.

United States v. Harpootlian, et al., 24 Fed. (2d) 646.

It must be held that the United States has adopted the laws of Idaho as to the enforcement of a judgment, otherwise it is without any means of realizing upon a judgment.

(POINT "D")

In its decision the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Cases Cited (Supra).

(POINT "A")

CONFLICT WITH PRIOR FEDERAL DECISIONS

Section 916, of the United States Revised Statutes, (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), provides that:

> "The party recovering a judgment in any common law cause in any District Court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the state in which such court is held, or by any such laws which may be subsequently enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such state laws as may be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Standing Rule 73 of the United States District Court of Idaho is as follows:

> "Subject to the provisions of the Acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the state courts are enforced and the state laws in relation to executions, sales, exemptions, rights of purchasers, rights of judgment creditors and judgment debtors, redemptions, liens of judgments and all decrees and proceedings supplementary to execution, as said provisions now exists or as they shall exist at the time in question, are adopted as rules of this court; and the Mar-

shal of this court shall conform his proceedings thereto; * * *"

And by Section 6910 of the Idaho Compiled Statutes 1919, it is provided:

> "The party in whose favor judgment is given, may at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

The United States Circuit Court quotes the above statutes and rule of the United States District Court for the District of Idaho, as being applicable under the facts in the instant case and then reaches the conclusion that the United States may proceed to satisfy the judgment in question by an execution issued after a lapse of five years contrary to the language of Section 6910, Idaho Compiled Statutes 1919, although it is conceded by the Government that in the case of a judgment in favor of a private person execution thereon cannot lawfully issue after the lapse of five years from the entry of judgment.

In the United States v. Harpootlian, et al., 24 Fed. (2d) 646, the facts as stated in the opinion are as follows:

> "That on March 29, 1927, an order was entered by the District Court of the United States for the Southern District of New York, directing the defendant in error, Harpootlian, to appear for examination supplementary to execution on April 19, 1927. The order appealed from vacates that order. Judgment was obtained against the defendant in error in favor of the United States on September 13, 1913. An execution thereon was issued on October

6, 1913, and returned unsatisfied. A second execution was issued September 21, 1926, and was returned unsatisfied. The provision for such examination is found in Section 916 of the United States Revised Statutes (28 U. S. C. A. Sec. 727) (C. S. Sec. 1540), reading: 'Statute quoted * * *.'"

The court says:

"The rule of the District Court for the Southern District of New York, in effect November 1st, 1926, provides that in common law causes the party shall be entitled to the same rights and remedies respecting attachments against the property and proceedings supplementary to execution as are or may be provided by the laws of the state of New York and it adopts such laws. Sec. 779 of the Civil Practice Act of the state of New York permits an examination of a debtor after the return of an execution at any time within ten years and enumerates the contents of an affidavit which must support the order requiring the debtor under the judgment to attend and be examined concerning his property."

The court then refers to the fact that Section 967 of the United States Revised Statutes (28 U. S. C. A. Sec. 814) (C. S. Sec. 1608), provides that judgments and decrees of the District Court, shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such state fix, by law, to the liens thereon."

And that Section 510 of the Civil Practice Act of New York provides that a lien or judgment upon real estate of the debtor which is docketed

in the county clerk's office in a charge for ten years after filing the judgment roll upon the real estate and chattels real in that county—.

And that Section 812 of Title 28 of the United States Code (28 U. S. C. A. Sec. 812) (C. S. Sec. 1606), provides that judgments and decrees of the "District Court of the United States * * * shall be liens on property throughout such state in the same manner and to the same extent, and under the same conditions only, as if such judgments and decrees had been rendered by the court of general jurisdiction of such state." The court also states it is provided that "whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or anything to be done in a particular manner" so that "a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such state shall authorize the judgments and decrees of the United States Courts to be registered, recorded, docketed, indexed, or otherwise conform to the rules and requirements relating to the judgments and decrees of the courts" of the United States. 25 Statutes, Sec. 357.

The court holds:

> "That it was necessary for the government to issue and have returned unsatisfied, an execution against the property of the defendant in error, real and personal, before an order to examine in supplementary proceedings could be granted."

And further states:

> "That by Section 652 of the Civil Practice

> Act of New York, it is provided that after a lapse of five years from the entry of final judgment execution can be issued thereon only where an execution was issued thereon within five years after the entry of the judgment and has been returned wholly unsatisfied or unexecuted."

Also:

> "The order vacated here for the examination was entered over ten years after the return of the excution unsatisfied. The executions were issued on the judgments of October 6, 1913, and September 21, 1926, respectively."

The court then proceeds to consider the effect of a judgment of the United States court as a lien on real estate, coextensive with the territorial jurisdiction of the District Court for the district in which the defendant lives and holds that judgments of the District Court have the same effect, and no more, in their operation as liens upon the property of judgment debtors as the law of the state in which they are rendered prescribed for judgments of the state courts.

The court further says: "but it is argued by the plaintiff in error that Section 779 of the Civil Practice Act of New York has reference to the first execution, and that the ten year period providing for examniation in supplementary proceedings is a limitation which is not binding against the United states as a sovereign power under the familiar rule that a statute of limitations may not be invoked against the United States. We fully recognize the principal of public policy applicable to all governments alike, which forbids that the

public interest should be prejudiced by the negligence of officers and agents, to whose care they are confided, and that the United States, as a sovereign power, is not bound by any statute of limitations unless Congress manifests its intention otherwise. United States v. Thompson, 98 U. S., 486, 25 L. Ed. 194. United States v. Nashville Ry., 118 U. S., 120, 6 Sup. Ct., 1006, 30 L. Ed., 81, Standley v. Schwalby, 114 U. S. 508, 13 Sup. Ct., 418, 37 L. Ed., 259. But judgments of the United States have the same effect and no more, in their operation as the lien upon the property of judgment debtors as the law of the state in which they are rendered prescribes for judgments of the state courts."

In United States v. Minor, 235 Fed. 101, (C. C. A. 4th Circuit and United States v. Kendall (D. C. La.,), 263 Fed., 126, it was held "that an action to enforce the lien and judgments in favor of the United States created by virtue of the state statutes making such judgments liens, if duly docketed against real estate for ten years could be maintained after the ten year period and this, because it is said to be a statute of limitations which may not be invoked against the United States."

The court continues and considers the effect of a judgment as a lien on real estate at common law and holds that any lien by judgment is created by statute and not by common law.

And further says, speaking of Section 510, Civil Practice Act of New York, which provides that a lien of judgment upon real estate of the debtor which is docketed in the county clerk's office is

a charge for ten years after filing the judgment roll upon the real estate and chattels read——" the provision of the Civil Practice Act of the State of New York, which creates the lien, provides in express terms the period of its existence. It is not a statute of limitations upon a right of action which may be of no avail against a sovereign."

Also, speaking of Section 652 of the Civil Practice Act of New York, which provides that after a lapse of five years from the entry of final judgment execution can be issued thereon only where an execution was issued thereon within five years after the entry of judgment and has been returned wholly unsatisfied or unexecuted, the court says: "The provisions of Civil Practice Act fixes a period of time within which a party having a judgment may follow the defendant's real estate into the hands of grantees or his personal property by execution. Failing to avail himself of such privilege within the time fixed, the right expires, and he must enforce his judgment, if at all, by some other method of levy and sale upon such property as he can find belonging to the judgment debtor, unaided by statutory lien."

Also, "The State statute makes no provision for extension of time in the case of a judgment obtained by the United States, nor can the officers of the government prolong it by neglecting to make use of its benefits. Payette v. Marshall Co., 180 Ia., 660, 163 N. W., 592. Thompson v. Avery, 11 Ut. 214, 39 Pac., 829.

Congress has provided only by the statutes above referred to that the right of execution and exam-

ination of debtor shall be coextensive and consistent with that granted by the state within the territory of the district where the statutory period has run, the right expires completely by the mere lapse of time the lien is ended. The doctrine of governmental immunity in the statute of limitations does not apply and when the time of lien lasped within the terms of its grant the government is in the same position as a private litigant.

In Fink v. O'Neil, 106 U. S., 272, 1 Sup. Ct., 125, 27 L. Ed. 196, "a perpetual injunction was granted to restrain the United States Marshal from proceeding upon a judgment rendered in favor of the United States in the District Court to levy on real estate, exempt under state law from sale under execution. In affirming the decree the court said: "Nothing can be more clear than this, as a recognition by Congress, that in case of executions upon the judgments in civil actions, the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on it found." After ten years have elapsed the lien of the plaintiff in error's judgment on real property of the defendant in error was at an end and the proceeding to examine in supplementary proceedings could not be maintained upon the basis of a continuation of the lien, because of the rule that the statute of limitations does not run against the United States."

The court in the case of United States v. Harpootlian, supra, considered two questions:

1. Execution having been issued and returned un-

satisfied pursuant to the provisions of Section 652 of the Civil Practice Act of New York, may on order be entered directing the defendant in error to appear for examination supplementary to execution after a lapse of more than ten years contrary to the provisions of Section 779, Civil Practice Act of the state of New York, which permits an examination of a debtor after the return of an execution at any time within ten years?

The court answered this question in the negative.

2. May the order be entered upon the grounds that plaintiff in error's judgment was a lien upon the real property of defendant in error after ten years had elapsed and that the order could be maintained upon the basis of a continuation of the lien?

The court answers this question in the negative, and referring to Section 510 of the Civil Practice Act of New York says: "It is not a statute of limitations upon a right of action which may be of no avail against a sovereign."

In considering both of these questions the court discusses the effect of Section 779 of the Civil Practice Act of the state of New York, which permits an examination of the debtor after the return of an execution at any time within ten years, and holds that the statute is binding against the United States as a sovereign power, notwithstanding the well recognized rule that the United States as a sovereign power is not bound by any statute of limitations unless Congress manifests its inten-

tion otherwise; and further, the court holds in referring to the statutes of New York that no provision for extension of time is recognized in the case of a judgment obtained by the United States, nor can the officers of the government prolong it by neglecting to make use of its benefits, and that Congress has provided only by the statutes referred to in the opinion that the right of execution and examination of a debtor shall be co-extensive and consistent with that granted by the state within the territory of the District Court, and where the statutory period has run the right expires completely by the mere lapse of time the lien is ended. The doctrine of governmental immunity in the statute of limitations does not apply and when the time of lien lapsed within the terms of its grant the government is in the same position as a private litigant.

Comparing the decision of the United States Circuit Court of Appeals for the Ninth Circuit in the instant case, with the holding of the Circuit of the Second Circuit, in the case of United States v. Harpootlian, et al, supra, we find that the Circuit Court fo rthe Ninth Circuit quotes Section 916 of the Revised Statutes (28 U. S. C. A. 727) standing Rule 73 of the United States District Court for the District of Idaho, and Section 6910, Idaho Compiled Statutes 1919, as being applicable under the facts and then holds, notwithstanding the provisions of Section 6910, Idaho Compiled Statutes 1919, that the United States may proceed to issue an execution more than eight years after the date of the entry of judgment and

levy upon petitioner's bank account and satisfy the judgment.

Why should there be a conflict between the Circuit Courts of the Ninth Circuit and the Second Circuit upon these questions? In its decision the Circuit Court for the Ninth Circuit says:

> "But the right of a judgment creditor to execution process does not have its origin in the state statute. It existed at common law. 3 Cooley's Blackstone, 431, Freeman on Execution, 3rd Ed., Sec. 27. The statute only enlarged the time during which the right may be exercises from one year to five years, and seemingly under the common law the limitation of time was not recognized as binding upon the state. Coombs v. Jordon, 3 Bland's Chancery (Md.), 284, 324; s. c. 22 Am. Dec. 236, 271. See also Nimmo's Executor v. Commonwealth, 4 Hen, and M. (Virginia Rep. Ann.) 57, While we have failed to find an any of the texts a discussion of this exception, it would appear to be highly illogical to hold that the state may, without regard to time, bring an action to recover on a claim but by lapse of time it is barred from enforcing its judgment thereon. After all, the ultimate purpose of an action is not to get a judgment but to recover the claim, and every consideration underlying the rule that the state should not be barred from bringing the suit with equal force supports the rule that it should not be barred from prosecuting the suit, once it is begun, to the complete accomplishment of the purpose thereof. If it is not to be prejudiced by the negligence of its officers and agents in bringing the action, neither should it be defeated by like negligence in respect to

taking out execution process upon the judgment. In the absence of some expression to the contrary it is, therefore, to be presumed the legislature intended only to enlarge the time of an established rule and not to widen its scope. While in its phraseology the statute suggests nothing more, under appellant's interpretation it would operate not to enlarge but to abridge a pre-existing right of one class of judgment creditors."

And has this to say of the cases cited in the brief, including United States v. Harpootlian et al., 24 Fed. .2d) 646:

"With the exception of the United States v. Noojin, 155 Fed., 377, 380, which seemingly supports the conclusion that we have reached, no decided case has come to our notice where the precise question has been considered. Of the other decisions cited in the briefs, those most nearly in point are Fink v. O'Neil, 106 U. S. 272, United States v. Minor, 235 Fed., 101, United States v. Kendell, 263 Fed., 126, and United States v. Harpootlian, 24 Fed. (2d) 646. In the Fink case was involved only by question whether as a creditor the government could ignore state exemption laws, and in the public policy underlying such statutes the court found cogent reasons for holding that Congress did not intend to except the United States from the operation thereof. In each of the other three cases the question at issue was whether or not a statute limiting the duration of a judgment lien was binding upon the government. In the Harpootlian case the question was answered in the affirmative, a conclusion apparently out of harmony with the view adopted in the other two. But, however that may be, admittedly there was no such

lien at common law and hence the liens in question were purely creatures of the statute. Not without reason, therefore, it could be held that the United States, as well as other creditors, must take such a lien with its statutory restrictions and limitations."

The United States Circuit Court of Appeals of the Ninth Circuit in the instant case holds that the right of a judgment creditor to execution process does not have its origin in the state statute. It existed at common law and that the statute only enlarged the time during which the right may be exercised from one year to five years, and seemingly under the common law the relation of time was not recognized as binding upon the state. And that while we have failed to find in any of the texts a discussion of this exception, it would appear to be highly illogical to hold that the state may, without regard to time, bring an action to recover upon a claim, but by lapse of time it is barred from enforcing its judgment thereon.

The court in the case of United States v. Harpootlian, supra, says:

"That the provision of the Civil Practive Act fixes a period of time within which a party having judgment may follow the defendant's real estate into the hands of grantees, or his personal property, by execution. Failing to avail himself of such privilege within the time fixed the right expires—; also Congress has provided only by the statutes above referred to that the right of execution and examination of debtors shall be co-extensive and consistent with that granted by the state within the territory of the District Court. Where the statu-

> ory period has run the right expires completely by the mere lapse of time the lien is ended. The dictrine of governmental immunity in the statute of limitations does not apply and when the time of lien lapsed within the terms of its grant, the government is in the same position as a private litigant."

The two decisions are in direct conflict. The weight of authority sustains the United States Circuit Court of Appeals of the Second Circuit. Also the courts are not in harmony as to the effect of the decision of the court in the case of Fink v. O'Neil, 106 U. S., 172, 1 Sup. Ct. 325, 27 L. Ed. 196. The Circuit Court of the Second Circuit cites this case as authority for the conclusion reached in its decision and quotes from that decision as follows:

> "Nothing can be more clear than this as a recognition by Congress that in case of executions upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found."

The Circuit Court for the Ninth Circuit in speaking of the case of Fink v. O'Neil, supra, says:

> "In the Fink case was involved only the question whether as a creditor the government could ignore state exemption laws and in the public policy underlying such statutes the court found cogent reasons for holding that Congress did not intend to except the United States from the operation thereof."

(POINT "B")

THE COURT HAS DECIDED AN IMPORTANT QUESTION OF GENERAL LAW IN AN UNTENABLE WAY AND IN CONFLICT WITH THE WEIGT OF AUTHORITY.

It will hardly be disputed that a decision of a court which lays down an unqualified rule as to the enforcement of judgments by execution disposes of an important question of general law. In other words, a judgment is the only effective means of realizing upon a claim and the enforcement of a judgment by process of the courts is the only way by which the rights of litigants may be settled in accordance with decisions of the courts. It involves a question of general law. To hold that a state statute which fixes the limitation within which an execution may be issued upon a judgment is a restriction upon a common law right, disposes of an important question of general law. The limitation upon a common law right at once becomes an important question of general law when applied as a restriction in the enforcement of a judgment.

In the case of Fink v. O'Neil, supra, the court says:

> "And if the laws in question do not permit an execution to issue upon a judgment in favor of the United States, except subject to the exemptions which apply to citizens, there are no others which confer authority to issue any execution at all. For, as was said by Mr. Justice Daniell, in Cary v. Curtis, 3 How, 236, 245, 'the courts of the United States are all limited in their nature and constitution and

have not the powers inherent in courts existing by prescription or by the common law.'"

A true statute of limitations alters the common law by introducing a limitation upon the common law right in mentioned cases and assigns a certain time reducing the common law period after which the right cannot be exercised or enforced.

In re Van Tassell's Will, 196 N. Y. S., 491,
Culp v. Butler (Ind.), 122 N. E., 684.

As opposed to statutes of limitation we have statutes of creation, which create a right and fix the time within which the right may be exercised.

Partee v. St Louis & S. F. R. Co., 204 Fed., 970.
United States ex rel Tex. P. Co. v. McCord, 233 U. S., 157. 58 L. Ed., 893.

The quotations from the decision of the United States v. Harpootlian, 24 Fed. (2d) 646, under Point "A" are applicable under this point as well.

(POINT "C")

CONGRESS CONSENTED THAT THE UNITED STATES SHALL BE BOUND BY STATE STATUTES AS TO LIMITATIONS IN ENFORCING JUDGMENTS IN A COMMON LAW ACTION BY EXECUTION; THE HOLDING OF THE COURT TO THE CONTRARY IS UNTENABLE AND IN CONFLICT WITH THE WEIGHT OF AUTHORITY AND DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT.

The Court disposes of an important question of general law because it lays down a rule for the enforcement of all judgments in favor of the United States. It will be recognized that the numerous enterprises which now engage the attention of the attention of the United States make questions of enforcing judgments in favor of the United States important questions of general law. The court also directly holds that Section 916 of the United States Revised Statutes (28 U. S. C. A. Sec. 727,) (C. S. Sec. 1540), gives the United States the right to proceed by execution to satisfy a judgment after the lapse of five years contrary to the provisions of a statute of Idaho adopted by the United States by appropriate legislative enactment. The decision deals with a question of practice which controls the enforcement of all judgments in the United States District Courts and, therefore, becomes decisive of a very important question of Federal law and should, in the interest of clarity, and as a saving of expense and time to litigants, be settled by the United States Supreme Court.

The decision is clearly untenable and in conflict with the weight of authority.

In the case of Fink v. O'Neil, supra, the court says:

> "The question, therefore, is, whether the United States, by an appropriate legislative act, has adopted the lews of Wisconsin exempting homesteads from execution and, if at all, whether they apply in cases of execution upon judgments in favor of the United States."

The court then quotes Section 916, Revised Stat-

utes, and traces the history of the statute through various enactments to its present form, and then says:

> "It will be seen from this provision that it was thereafter prohibited to the courts of the United States either to adopt or recognize any form of execution, or give any effect to it, except such as was, at the time of the passage of the act, or had subsequently become at the time of their adoption, a writ authorized by the laws of the state. The same provision has ever since been continued in force and is now embodied in Section 916 of the Revised Statutes already quoted."

Also:

> "It is further to be observed that no distinction is made in any of the statutes on the subject between executions on judgments in favor of private parties and on those in favor of the United States. And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that exemptions from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States."

The court holds that the exemption of homesteads from levy and sale upon executions provided by the statute of Wisconsin became a law of the United States within that state and applies to executions issued upon judgments in several cases referred to in their courts in their own name and behalf, equally with those upon judgments rendered in favor of private parties, and the court uses this language:

"This conclusion cannot be avoided by the consideration which has been urged upon us, that the process acts do not limit the sovereign rights of the United States upon the principle that the sovereign is not bound by such laws unless he is expressly named. These laws are the expression of the sovereign will on the subject and are conclusive upon the judicial an dexecutive officers to whom they are addressed; and as they forbid the issue of an execution in every case, except subject to the limitations which they mention, and as there is no authority to issue an execution in any case whatever, except as conferred by them, the sovereign right invoked is left without the means of vindication. The United States cannot enforce the collection of a debt from an unwilling debtor except by judicial process. They must bring a suit and obtain a judgment. To reap the fruit of that judgment they must cause an execution to issue. The courts have no inherent authority to take any one of these steps except as it may have been conferred by the legislative department; for they can exercise no jurisdiction except as the law confers and limits it."

Aud further:

"This objection is also met expressly by the decision of this court in the case of United States v. Knight, 14 Pet. 301. * * * And the court later in the opinion says: 'If a contrary construction to the process acts should be given on the ground that they do not include the United States, which, although a litigant, continues, nevertheless, to exercise the prerogatives of a sovereign, would follow that they might resort to any writ known to the common law, however, antequated or obso-

lete, and in defiance of the progress of enlightened legislation on that subject, revive all the hardships of imprisonment for debt, even without the liberty of statutory jail limits."

And the court holds:

"That in case of executions upon judgments in civil actions, the United States are subject to the same exemptions as applied to private persons by the law of the state in which the property levied on is found."

The holding of the Circuit Court of Appeals of the Ninth Circuit in the case at bar is opposed to the rules as announced by the United States in the case of Fink v. O'Neil, supra, and consequently is in conflict with the weight of authority and untenable.

(POINT "D").

THE DECISION CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The decision of the court deals particularly with a rule of proceduce, viz: the enforcement of a judgment. The accepted and usual course of judicial proceedings as to the enforcement of judgments, is governed by the Act of Congress, Section 916 of the United States Revised Statutes (28 U S C A 727), and a construction of this statute should be clear and unambiguous and in harmony with the weight of authority. When a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings measured by this standard, it should call for an exercise of this court's power of supervision.

CONCLUSION

It is, therefore, respectfully submitted, that this case is one calling for the exercise by this court of its supervisory powers in order that the conflict between the holding in the case at bar and the decision in the case of United States v. Harpootlian, et al., 2 4Fed. (2d) 646, may be reconciled, and that the important questions of general law which have been disposed of in the instant case in an untenable way and in conflict with the weight of authority, may be corrected, and that the decision which has been rendered upon an important question of Federal law may be settled by the United States Supreme Court, and that to such an end a writ of certiorari should be granted, and this court should review the decision of the United States Circuit Court of Appeals for the Ninth Circuit and finally reverse it.

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No. 422

In the Supreme Court of the United States

OCTOBER TERM, 1930

W. W. CUSTER, PETITIONER

v.

ROB. B. MCCUTCHEON, SUBSTITUTED FOR F. M. BRASHEARS, DECEASED, UNITED STATES MARSHAL FOR THE DISTRICT OF IDAHO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 422

W. W. CUSTER, PETITIONER

v.

ROB. B. MCCUTCHEON, SUBSTITUTED FOR F. M. Brashears, Deceased, United States Marshal for the District of Idaho

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 17) is not reported. The opinion of the Circuit Court of Appeals (R. 40) is reported in 41 F. (2d) 354.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 9, 1930. (R. 45.) The petition for certiorari was filed September 4, 1930. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a writ of execution may issue on a judgment for money entered in the United States District Court for the District of Idaho in favor of the United States after a period of five years from the date of the entry of the judgment.

STATUTES AND RULES OF COURT INVOLVED

The statutes and rules of court involved are set forth in the discussion of this case, *infra*.

STATEMENT

On March 7, 1921, the United States recovered judgment against the petitioner in the United States District Court for the District of Idaho, in the sum of $2,086.87. (R. 8.) On September 21, 1929, a writ of execution was issued out of the District Court upon this judgment (R. 9), under which execution the United States Marshal on October 9, 1929, made a levy upon moneys of the petitioner on deposit in a bank at Shoshone, Idaho. (R. 8.) On October 10, 1929, the petitioner filed a bill in the District Court seeking to enjoin the Marshal from withdrawing the moneys of petitioner on deposit in the bank, and from applying it to the satisfaction of the judgment above described. The bill set forth the facts above stated and alleged that the judgment was unenforceable by reason of the Statute of Limitations, and that the execution issued thereunder was void. (R. 7–11.) A temporary restraining order was entered by the

District Court (R. 13–14), and thereupon the Marshal moved to dismiss the complaint upon the ground that it did not state sufficient facts to entitle the plaintiff to the relief sought (R. 16).

The District Court dismissed the complaint and set aside the temporary restraining order. (R. 20–21.) Upon appeal to the Circuit Court of Appeals this judgment was affirmed. (R. 45.)

ARGUMENT

On March 7, 1921, the United States recovered judgment against the petitioner for $2,086.87 in the United States District Court for the District of Idaho. The question presented is whether a writ of execution may issue on this judgment more than five years after the entry of the judgment.

Section 6910 of the Idaho Compiled Statutes of 1919 provides that—

> The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Section 916 of the United States Revised Statutes (U. S. C., Title 28, Sec. 727) provides that:

> The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held,

or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Rule 73 of the United States District Court for the District of Idaho, promulgated March 15, 1924, provides:

* * * * *

Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments, and of decrees and proceedings supplementary to execution as said provisions now exist or as they shall exist at the time in question are adopted as rules of this Court; and the Marshal of this court shall conform his proceedings thereto. * * *

The petitioner contends that Section 6910 of the Idaho Compiled Statutes, as adopted by Section 916 of the United States Revised Statutes, is not a statute of limitations, but a statute of creation, giving rise to new rights; that the United States, having adopted the State statute, must take the

same subject to the limitation that execution may issue only within five years from the date of judgment; and that accordingly the doctrine that the sovereign is not bound by statutes of limitations is not applicable to the instant case.

Section 14 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 81 (Section 716, Revised Statutes; U. S. C. Title 28, Sec. 377) provided that the Federal courts should have power to issue writs of *scire facias* and "all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." In *United States Bank* v. *Halstead,* 10 Wheat. 51, 56, this Court said that the statute quoted embraced writs of execution, and not only such writs as were authorized by the common law, but such writs of execution as were in use in the State courts at the time. This statute was modified by the Act of September 29, 1789, c. 21, 1 Stat. 93, declaring that the forms of writs of executions and modes of process in the circuit and district courts in suits at common law should be the same in each State as were used or allowed in the Supreme Court of that State. This latter statute, as thereafter amended, became Section 916 of the Revised Statutes.

The rest of the argument in behalf of the respondent is well expressed in the following extract from the opinion of the Circuit Court of Appeals in the instant case (R. 42–43):

* * * the right of a judgment creditor to execution process does not have its origin in the state statute; it existed at common law. 3 Cooley's Blackstone, 431; Freeman on Execution, 3d ed., Sec. 27. The statute only enlarged the time during which the right may be exercised from one year to five years, and seemingly under the common law the limitation of time was not recognized as binding upon the state. *Coombs* v. *Jordan*, 3 Bland's Chancery (Md.), 284, 324; s. c. 22 Am. Dec. 236, 271. See, also, *Nimmo's Executor* v. *Commonwealth*, 4 Hen. & M. (Virginia Rep. Ann.) 57. While we have failed to find in any of the texts a discussion of this exception, it would appear to be highly illogical to hold that the state may, without regard to time, bring an action to recover on a claim but by lapse of time it is barred from enforcing its judgment thereon. After all, the ultimate purpose of an action is not to get a judgment but to recover the claim, and every consideration underlying the rule that the state should not be barred from bringing the suit with equal force supports the view that it should not be barred from prosecuting the suit, once it is begun, to the complete accomplishment of the purpose thereof. If it is not to be prejudiced by the negligence of its officers and agents in bringing the action, neither should it be defeated by like negligence in respect of taking out execution process upon the judgment. In the absence of some expression to the contrary it is therefore to be presumed the legis-

lature intended only to enlarge the time of an established rule and not to widen its scope. While in its phraseology the statute suggests nothing more, under appellant's interpretation it would operate not to enlarge but to abridge a preexisting right of one class of judgment creditors.

Petitioner relies upon *Fink* v. *O'Neil*, 106 U. S. 272. In that case it was held that the homestead of a judgment debtor was not subject to seizure and sale by virtue of an execution sued out on a judgment recovered by the United States in a civil action in a Federal court in Wisconsin, because of the provisions of the Wisconsin statute exempting homesteads from seizure and sale on execution. The opinion of the Court at the outset considered the question whether the State would be bound by the exemption. It construed the Wisconsin statute as forbidding seizures of homesteads even by that sovereign, and held that the adoption of the Wisconsin law by the Conformity Act operated as an adoption of the exemption of homesteads from seizure on execution even in suits by the United States. Although the opinion contains language which furnishes some support for the contention of petitioner, we submit that the ground for decision is that indicated above. The Idaho statute limiting the time for taking out executions should be construed as not applying to the State of Idaho. The Circuit Court of Appeals so held. The Idaho courts have not passed upon the point. It is significant

that Chapter 250 of the Idaho Compiled Statutes, 1919, relating to the time for commencing civil actions, contains an express provision (Section 6618) that "The limitations prescribed *in this chapter* apply to actions brought in the name of the state," but that there is no similar provision in Chapter 257, relating to executions, in which occurs Section 6910, quoted on p. 3, *supra*. There seems to be a dearth of authority as to whether statutes in other States similar to Section 6910 of the Idaho statutes apply to the sovereign. In *Villescas* v. *Arizona Copper Co.*, 20 Ariz. 268, the court held that a similar Arizona statute did not apply to the United States. See also *United States* v. *Noojin*, 155 Fed. 377 (S. D. Ala.).

Petitioner asserts that the decision in the instant case is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Harpootlian*, 24 F. (2d) 646. There the court held that that part of a State statute which limited the duration of a judgment lien was binding upon the United States. The court there pointed out that at common law a judgment did not create a lien on real estate and that the statute in question which created the lien provided in express terms the period of its existence. Consequently, the decision does not appear to conflict with that in the instant case, which involves a writ of execution, which did not originate in the State statute.

CONCLUSION

Although the question in the instant case is not free from doubt, we contend that the decision of the courts below was correct. The question appears to be one of infrequent occurrence and of little importance. In view of this and the fact that there is no direct conflict of authority on the point, we submit that the petition should be denied.

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OCTOBER TERM, 1930

W. W. CUSTER, PETITIONER

v.

ROB B. MCCUTCHEON, SUBSTITUTED FOR F. M. BRESHEARS, DECEASED, UNITED STATES MARSHAL FOR THE DISTRICT OF IDAHO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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tion of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a writ of execution may issue on a judgment for money entered in the United States District Court for the District of Idaho in favor of the United States after a period of five years from the date of the entry of the judgment.

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tations, and that the execution issued thereunder was void. (R. 7–11.) A temporary restraining order was entered by the District Court (R. 13–14), and thereupon the Marshal moved to dismiss the complaint upon the ground that it did not state sufficient facts to entitle the plaintiff to the relief sought (R. 16).

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> The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.

Section 916 of the United States Revised Statutes (U. S. C., Title 28, Sec. 727) provides that:

> The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment

debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise.

Rule 73 of the United States District Court for the District of Idaho, promulgated March 15, 1924, provides:

* * * * *

Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced, and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments and of decrees and proceedings supplementary to execution as said provisions now exist [or] as they shall exist at the times in question are adopted as rules of this Court; and the Marshal of the Court shall conform his proceedings thereto; * * *.

The petitioner contends that Section 6910 of the Idaho Compiled Statutes is not a statute of limitations, but a statute creating rights, and that by Rule 73 of the United States District Court for the District of Idaho that court, pursuant to the provisions

of Section 916 of the United States Revised Statutes, adopted Section 6910 of the Idaho Compiled Statutes, and accordingly that no execution may issue out of the United States District Court for the District of Idaho more than five years after entry of judgment, even though the United States was plaintiff in the suit. Upon this theory the petitioner seeks to avoid the application of the usual rule that the United States is not bound by state statutes of limitation. It is to be noted that the bill of complaint described the statute as one of limitation. (R. 9.)

The District Court, construing its own rule, held that Section 6910 of the Idaho Compiled Statutes was a statute of limitations, that despite its Rule 73, the United States was not bound by it, and that the United States should have execution more than five years after the entry of judgment. The Circuit Court of Appeals reached the same conclusion. It is submitted that the judgment of the court below was clearly right.

The power of the Federal courts to enforce their judgments by writs of execution does not come to them from any state statutes, but was expressly conferred upon them by Congress. The power to issue writs of execution was originally conferred upon the Federal courts by Section 14 of the Judiciary Act of 1789, c. 20, 1 Stat. 81. This provided that—

> all the before-mentioned courts of the United States, shall have power to issue

> writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.

This Court said, in *Wayman* v. *Southard,* 10 Wheat. 1, at page 22:

> The words of the 14th [section] are understood by the court to comprehend executions. * * * On the clearest principles of just construction, then, the 14th section of the judiciary act must be understood, as giving to the courts of the Union, respectively, a power to issue executions on their judgments.

By a subsequent Act "to regulate processes in the courts of the United States" (1 Stat. 93) Congress provided that—

> until further provision shall be made, and except where by this act, or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process * * * in the circuit and district courts, in suits at common law, shall be the same in each State respectively as are now used or allowed in the supreme courts of the same.

This latter provision as subsequently modified became Section 916 of the United States Revised Statutes quoted above. It appears, therefore, that since the Judiciary Act of 1789 the United States courts have had power to issue writs of execution.

This power was conferred upon them by Congress, and it does not depend upon state legislation.

At common law, writs of execution in favor of private litigants were required to be sued out within a year and a day after the entry of judgment. 3 Cooley's Blackstone, 2d ed., 419; *Mitchell* v. *Chesnut,* 31 Md. 521; *Bolton* v. *Lansdown,* 21 Mo. 399. If not, the court would conclude *prima facie* that the judgment was satisfied and extinct, but even at common law writs of *scire facias* could be granted to private litigants, after the expiration of one year, requiring the defendant to show cause why the judgment should not be revived. 3 Cooley's Blackstone, 2d ed., 419. But there was no limitation upon the time for the issuance of a writ of execution in favor of the crown, and no writ of *scire facias* was necessary in order to enable the crown to enforce a judgment in its favor. *Coombs* v. *Jordan,* 3 Bland's Chancery (Md.) 284, 324; s. c. 22 Am. Dec. 236, 271. *Anonymous,* 2 Salk, 603. In *Nimmo* v. *Commonwealth,* 4 Hen. & M. 57, s. c. 4 Am. Dec. 488, the Supreme Court of Appeals of Virginia applied the same rule in favor of the commonwealth. The court below held that this rule applied to executions in favor of the United States in the courts of the United States. It seems clear that as the United States succeeded to the favored position of the crown with respect to statutes of limitation, this rule, which obtained at common law in favor of the crown, should likewise be applied

in favor of the United States in the absence of some statutory limitation of the rule by Congress. There is no provision in the United States statutes which in any way limits the time within which executions may be issued in courts of the United States upon judgments in favor of the United States. Congress has provided that executions upon judgments in favor of the United States may run and be executed in any State or Territory, but that they shall be issued from and be returnable in the court where the judgment was obtained. United States Revised Statutes, Section 986. (U. S. C., Title 28, Sec. 839.) This shows an intent to give executions upon judgments in favor of the United States a larger scope than executions in favor of private parties, which only run throughout the State in which the District Court rendering the judgment sits. United States Revised Statutes, Section 985. (U. S. C., Title 28, Sec. 838.)

If the time within which executions may issue on judgments in favor of the United States is governed by the provisions of Section 6910 of the Idaho Compiled Statutes, this could only be regarded as a limitation upon a power of the United States District Court in Idaho, which is otherwise unlimited in time. The effect and purpose of Section 6910 was to enlarge the time within which executions could be issued in favor of private litigants in the state courts from the year and a day allowable at common law to five years. No intention to

restrict the right of the sovereign to have execution upon its judgments at any time is expressed or to be implied. So far as private litigants are concerned, the statute may well be a statute of creation, but if applied to executions upon judgments in favor of the United States in the United States courts, it must be regarded as a true statute of limitations. It was so treated in petitioner's bill. (R. 9.) It would be equally a statute of limitations if applied to executions upon judgments of the State of Idaho. Statutes limiting the time within which executions may be issued have been said to be statutes of limitation and repose. *Livingston* v. *Paxton*, 2 Utah 481. This is plainly what they are.

It is a settled principle that statutes of limitations in general do not bind the sovereign in the absence of express provision that the limitation shall be binding upon the sovereign. This is because of the maxim *quod nullum tempus occurrit regi*. The reason for the maxim is stated by Justice Story in *United States* v. *Hoar*, 2 Mason 311, at page 313, as follows:

> The true reason, indeed, why the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right (though sometimes asserted to be, because the king is always busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects) is to

> be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments.

This principle has been frequently applied to the United States, and the rule is that no statute of limitations binds the United States unless Congress has expressly provided that it should. *Lucas* v. *Pilliod Lumber Co.*, 281 U. S. 245; *Grand Trunk Western Ry. Co.* v. *United States*, 252 U. S. 112; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310. Nor is the United States bound by the laches of its officers. *Ches. & Del. Canal Co.* v. *United States*, 250 U. S. 123; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389; *United States* v. *Kirkpatrick*, 9 Wheat. 720. In the absence of express Congressional authority therefor no state statute of limitation binds the United States. *Ches. & Del. Canal Co.* v. *United States, supra; United States* v. *Insley*, 130 U. S. 263; *United State* v. *Beebe*, 127 U. S. 338; *United States* v. *Nashville, etc., Ry. Co.*, 118 U. S. 120; *United States* v. *Thompson*, 98 U. S. 486.

It would be a strange doctrine, indeed, for the United States to be free to sue without regard to state statutes of limitations and yet be barred by such statutes from enforcing its judgments. The

very purpose of the exemption would thus be defeated.

Section 6910 of the Idaho Compiled Statutes does not even limit the right of the State of Idaho to obtain execution upon a judgment in its favor. The State of Idaho is a sovereign within its boundaries, and the usual rule that the sovereign is not bound by statutes of limitation (unless expressly included) applies to it. *Rhode Island* v. *Massachusetts,* 15 Pet. 233; *Weber* v. *Harbor Commissioners,* 18 Wall. 57; *Armstrong* v. *Morrill,* 14 Wall. 120; *Gibson* v. *Chouteau,* 13 Wall. 92. The inapplicability of Section 6910 of the Idaho Compiled Statutes to the State of Idaho, in a suit in which that State recovers judgment, does not depend entirely upon the application of these general principles. Chapter 250 of the Idaho Compiled Statutes of 1919 imposes limitations upon the time for commencing civil actions, and in Section 6618 (of Chapter 250) there is an express provision that—

> The limitations prescribed *in this chapter* apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties. (Italics ours.)

Section 6910 of the Idaho Compiled Statutes of 1919 is not found "in this chapter" (250) but in Chapter 257, and there is no statutory provision imposing the limitation of Section 6910 upon the state. The Idaho courts have emphasized the words in Section 6618 which we have italicized, and

have held in effect that no limitations, other than those found in Chapter 250, apply to the State of Idaho or its political subdivisions in governmental matters. In *In re Counties* v. *County of Alturas*, 4 Idaho 145, after discussing the application of the maxim *quod nullum tempus concurrit regi*, the court said, at page 151:

> It is a principle of the common law that the government—and therefore, by parity of reasoning, a county—can not be guilty of laches. It is also well settled that a state is not barred by a statute of limitations, unless expressly named. (*Madison Co.* v. *Bartlett*, 1 Scam. 70; *Bank* v. *Brown*, 1 Scam. 107.) Agents of the county are not acting for themselves, but for the county, and therefore the county is not barred by their neglect. (*Bank* v. *Brown, supra.*) As respects public rights or property held for public use upon trusts, municipal corporations are not within the operation of the statute of limitations;

The court also said, at page 153:

> It is contended that sections 4060 and 4061 of the Revised Statutes of Idaho make the statute of limitations applicable to the state and to the counties thereof, and to actions of the character of the one at bar. Section 4060 states: "An action for relief not hereinbefore provided for must be commenced," etc. It will be noticed that all the sections preceding section 4060 apply to actions by or against private individuals for the en-

forcement of a private right or correction of a private wrong, and therefore we must conclude that section 4060 refers to actions of the same character which have not been specially enumerated in the other sections. It would seem to be clear that, if actions of a public nature to enforce the performance of a public duty or obligation were intended to be included in this section the legislature would have said so, as this would include actions of an entirely different nature from those specified in the other sections of the chapter, and, if so construed, would include a large class of cases of which nothing is said in the limitation statutes, and which are clearly not barred by lapse of time. We can not thus undertake to extend the statute, by construction, beyond what the legislature seem to us evidently to have intended. The same is true with reference to section 4061. The state, in the enforcement of a right against private individuals, would not ordinarily be barred, and not at all unless specially named; and therefore section 4061 says (as amended): "The limitations prescribed in this title apply to actions brought in the name of the state, or for the benefit of the state." This section is specifically restricted to the limitations "prescribed in this title"; that is, to actions of a private nature, and against private individuals. To hold that it applied to actions such as the one at bar would seem to be extending the limitation beyond either the words or meaning of the

> statute, and therefore beyond the intention of the legislature. If the court did this in this case, where a public duty is involved and required, why may the court not be called upon to extend the statute to other duties and rights of a public nature, which are not included, and not intended to be included, in the statute of limitations? (*People* v. *Melone*, 73 Cal. 574, 15 Pac. 294.)

While there appears to be no decision by the Idaho courts dealing with the question of whether or not Section 6910 of the Compiled Statutes of Idaho would be binding on the State of Idaho, this decision indicates that the general rule that statutes of limitation do not apply to the State unless such application is expressly provided for, is recognized and enforced in the courts of Idaho.

Since it is clear that even the State of Idaho itself would not be bound by limitations, it is plain that such limitations upon the issuance of executions could not apply to executions issued by the United States courts upon judgments in favor of the United States. Justice Story, in *United States* v. *Hoar, supra*, at page 315, dealing with the application to the United States of state statutes of limitation generally, stated the principle succinctly:

> It is not to be presumed, that a state legislature mean to transcend their constitutional powers; and, therefore, however general the words may be, they are always restrained to persons and things, over which the jurisdiction of the state may be rightfully ex-

> erted. And if a construction could ever be justified, which should include the *United States*, at the same time that it excluded the *State*, it is not to be presumed, that Congress could intend to sanction an usurpation of power by a State to regulate and control the rights of the *United States*. In the language of the act of 1789, it would not be a case, where the laws of the state could apply. The mischiefs, too, of such a construction, would be very great. The public rights, revenue, and property would be subject to the arbitrary limitations of the state; and the limitations are so various in these states, that the government would hold their rights by a very different tenure in each.

It may perhaps be answered that in the instant case there can be no question of power because Congress has adopted the state statute. R. S. 916. We contend that the adoption by the United States of a state statute of limitations expressly made applicable to the State, can not be construed as a limitation upon the sovereignty of the United States unless the adoption is by Congress and Congress has by the terms of the adoption expressly provided that such statute of limitations shall also bind the United States. But even if this were not so, certainly a state statute, not intended as a limitation upon the sovereign which enacted it, can not be a limitation upon the sovereign which adopts it. If the State was excepted from its provisions the United States was also excepted when

its application to private litigants was extended by statute to the United States courts without express provision that it should apply to executions upon judgments recovered by the United States.

Such decisions as there are dealing with the question involved in this case indicate that limitations on the issuance of executions contained in state statutes do not apply to executions upon judgments in favor of the United States. *United States* v. *Noojin,* 155 Fed. 377 (S. D. Ala.), writ of error dismissed, 164 Fed. 692, judgment affirmed, 164 Fed. 1023; *Villescas* v. *Arizona Copper Company,* 20 Ariz. 268; *Swearingen* v. *United States,* 11 Gill & Johns, (Md.) 373.

In petitioner's brief in support of the petition for certiorari (which he also submits on the merits), the petitioner relied principally upon *Fink* v. *O'Neil,* 106 U. S. 272, and *United States* v. *Harpootlian,* 24 F. (2d) 646. These cases are clearly distinguishable and do not govern here.

The sole question in *Fink* v. *O'Neil, supra,* was whether or not the homestead of a judgment debtor was subject to seizure and sale by authority of an execution sued out on a judgment recovered by the United States in a civil action in a Federal court sitting in Wisconsin, under the provision of the Wisconsin statute exempting homesteads from seizure and sale on execution. At the outset of the decision this Court considered whether the exemption would prevail as to judgments in favor of the State of Wisconsin, and concluded that the State would

be bound by the exemption. Construing the Wisconsin statute as exempting homesteads from seizure under an execution issued in favor of the State, this Court held that the adoption of the Wisconsin law by the Conformity Act, operated as an exemption of homesteads from seizure on execution, even in suits by the United States. There is some language dealing with executions generally, but this was *obiter,* and we submit that the basis of the decision was the narrow one indicated above. As we have shown, the State of Idaho is not bound by the limitations contained in Section 6910 of the Compiled Statutes of Idaho, and for the reasons indicated, the United States is not bound thereby.

In *United States* v. *Harpootlian, supra,* the Circuit Court of Appeals for the Second Circuit held that the statute of the State of New York limiting the duration of a judgment lien to ten years was binding upon the United States. The court in that case, however, pointed out that judgments were not liens upon real estate at common law, and that a judgment in favor of the United States could only be a lien upon real estate in the State of New York by virtue of the state statute. Having adopted the statute, the United States had to take the limitation upon the duration of the lien with the benefits of the lien conferred by the state statute. We are not dealing in this case with a right conferred by a state statute, but with the claim that the State has limited a right which it did not, and could not, confer, for the right to issue execution already re-

sided in the United States courts without limitation. This unlimited right of the United States, as a sovereign, which has not been expressly limited by the sovereign itself, continues to exist.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 422.—October Term, 1930.

W. W. Custer, Petitioner,
vs.
Rob. B. McCutcheon, Substituted for F. M. Breshears, deceased, United States Marshal for the District of Idaho.

On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

[May 18, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondent's predecessor, as United States marshal, on October 9, 1929, levied an execution issued September 21, 1929, out of the District Court for Idaho, against the petitioner, upon a judgment entered in that court March 7, 1921, in favor of the United States. On October 10, 1929, the petitioner filed a bill in the same court to restrain the marshal from proceeding further under the execution process, on the ground that § 6910 of the Idaho Compiled Statutes of 1919 permitted the issuance of execution only within five years from the date of rendition of judgment. The District Court, on motion of the United States, dismissed the bill, and the Circuit Court of Appeals affirmed its judgment.[1] This Court granted certiorari.[2]

The question presented is whether the Idaho statute, which has been adopted as governing execution process in the United States District Court for that state, is applicable to an execution issued on behalf of the United States as a judgment plaintiff. The statute follows:

"The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

It has become a part of the law of procedure in the United States Court by virtue of § 916 of the Revised Statutes,[3] which provides:

"The party recovering a judgment in any common-law cause in any district court, shall be entitled to similar remedies upon the

[1] 41 F. (2d) 354.
[2] 282 U. S. —.
[3] U. S. C., Title 28, § 727.

same, by execution or otherwise, to reach the property of the judgment debtor, as are provided in like causes by the laws of the State in which such court is held, or by any such laws which may subsequently be enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such State laws as may be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise;"

and Standing Rule 73 of the District Court which is:

"Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced, and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments and of decrees and proceedings supplementary to execution as said provisions now exist or as they shall exist at the time in question are adopted as rules of this Court; and the Marshal of this Court shall conform his proceedings thereto; . . . ."

As a result of § 916 and Rule 73, the Idaho statute is applicable to proceedings in the District Court as if it had been passed by Congress. In the language of Rule 73, it has been "adopted" as a rule of the court. While it is clear that it governs executions issued on judgments recovered by other litigants, the lower courts held that it does not apply to those sued out by the United States. This ruling is based upon the familiar doctrine that in the absence of specific provision to the contrary statutes of limitation do not bind the sovereign. The petitioner insists that this act is not in the ordinary sense of the term a statute of limitation, that it does not affect the time within which a suit may be brought upon the judgment, but that on the contrary it grants the right of execution, and the time element is an integral part of the statutory right conferred. Petitioner says that in this aspect the United States as plaintiff is on no better footing than any other litigant availing itself of the provisions of the statute. A proper decision depends upon the scope and meaning to be given to R. S. 916, and the rule of court.

Section 14 of the Judiciary Act of 1789[4] conferred upon the courts of the United States power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which might be necessary for the exercise of their jurisdiction agreeably to the principles and usages of law. These words

[4] C. 20; 1 Stat. 81. U. S. C., Title 28, § 377.

comprehended executions on judgments. *Wayman* v. *Southard*, 10 Wheat. 1, 22.

At the same session an act was passed "To regulate Processes in the Courts of the United States".[5] It provided that:

"Until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."

This act was to remain in force only until the expiration of the next session of Congress. It was followed by that of May 8, 1792;[6] and thereafter by other acts,[7] the last of which became R. S. § 916.

Section 916 prohibits the courts of the United States from adopting, recognizing or giving effect to any form of execution, except such as was, at the time of the passage of the act of 1872, from which it was derived, or has subsequently become by adoption of state statutes, a writ authorized by the laws of the state. *Fink* v. *O'Neil*, 106 U. S. 272, 278.

This Court has twice considered the bearing of these statutes upon executions issued on judgments in favor of the United States. In *United States* v. *Knight*, 14 Pet. 301, it was held that the act of 1828, *supra*, gave to debtors in prison under executions from the courts of the United States, at its suit, the privilege of jail limits in the several states as they were fixed by the laws of those states at the date of the act. It was asserted that the statute did not include executions on judgments in favor of the United States, as the sovereign is never bound by any statute unless expressly named. The contention was, however, overruled, and it was held that the obvious intent to create a conformity between the mode of proceeding in federal courts and state courts ought to be given effect.

In *Fink* v. *O'Neil*, *supra*, the question was whether the homestead of a defendant resident in Wisconsin was subject to seizure and sale under an execution issued out of a federal court on a judgment recovered by the United States. It was held that the Wisconsin statute exempting homesteads from such seizure, which

[5]Act of September 29, 1789, c. 21; 1 Stat. 93.

[6]C. 36, Sec. 2; 1 Stat. 276.

[7]May 19, 1828, c. 68; 4 Stat. 281. June 1, 1872, c. 255; 17 Stat. 197. The latter became R. S. 916, now U. S. C., Title 28, § 727.

admittedly embraced executions issued on judgments held by private citizens, applied also to the United States. It was observed that no distinction is made in any of the successive statutes on the subject between executions on judgments in favor of private parties and those in favor of the United States. The Court added:

"And as there is no provision as to the effect of executions at all, except as contained in this legislation, it follows necessarily that the exemptions from levy and sale, under executions of one class, apply equally to all, including those on judgments recovered by the United States."

The contention of the government that on grounds of public policy the sovereign ought not to be subject to exemptions binding on private suitors was overruled.

It is clear, therefore, that R. S. § 916 and rules of court adopted pursuant thereto confine the United States to such executions as may be issued by individuals under the state statutes, and impose upon it the same restrictions and exemptions as are applicable to other suitors, and the question here is whether an exception should be made to this general rule as respects the time fixed by the state statute within which execution must issue. We see no valid reason for making such an exception. The time limited for issuing executions is, strictly speaking, not a statute of limitations. On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in the course of a litigation after it is instituted. The plaintiff is not precluded from bringing an action upon the judgment, but merely from having an execution in the form provided by state law.

It is argued on behalf of the United States that the five year period is not binding upon the state of Idaho, and therefore the adoption of the statute does not affect the federal government in respect of the time of issuance of the writ. We find no decision of the supreme court of Idaho exempting the sovereign from the provisions of the statute, nor does examination of other cognate sections of the Idaho Compiled Statutes disclose any matter which would indicate such a purpose. We think that in the interest of uniformity, and in the absence of either express state decision or provision by Congress to the contrary, the statute is to be held applicable to all plaintiffs seeking to avail themselves of the writ of execution therein provided, including the United States.

The judgment must be

Reversed.